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No. 93-377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK; JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

ELIAS H. ATTEA, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The New York State Association of Tobacco and Candy Distributors ("Association" or "*Amicus*") hereby respectfully moves this Court for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari of the Department of Taxation and Finance of the State of New York and James

W. Wetzler, Commissioner of Taxation and Finance of the State of New York.

The Petitioners have consented to the filing of a brief *amicus curiae* in these cases. Respondents' counsel have not consented.

The Association is a New York not-for-profit corporation representing approximately 70 distributors of cigarettes in New York State. Its members sell to chain stores, other wholesalers, and retailers, and distribute approximately 80% of all cigarettes sold in New York State.

The Association has a direct and vital interest in the continued viability and enforcement of the regulations at issue in these cases. Many of the Association's members compete directly with licensed cigarette agents and other wholesalers that do not collect cigarette taxes on cigarettes sold to retail outlets on Indian reservations in New York State for resale to non-Indian purchasers. Agents and other wholesalers that do not purchase and affix the required tax stamps on packages of cigarettes sold for resale to non-Indians evade the collection of $5.60 in cigarette taxes on every carton of cigarettes sold to Indian retailers for resale to non-Indian purchasers in New York State. Those agents and wholesalers thereby enjoy an unlawful competitive advantage over Association members that pay and collect the required tax on all of their cigarette sales within the State, resulting in an annual loss of revenue to Association members and other legitimate agents from the sale of untaxed cigarettes to non-Indians by retailers on Indian reservations which the Association estimates is well in excess of $205 million.

While *Amicus* seeks the same result in these cases as do the Petitioners, it believes that based upon its knowledge of the functioning and economics of the cigarette distribution industry in New York, arguments presented by *Amicus* would be of particular assistance to the Court in facilitating an understanding of the industry and of the purpose and effect of the regulations at issue. *Amicus* therefore believes that its participation would assist the Court in the disposition of these cases.

If the writ is granted, the Association intends to file a brief *amicus curiae* on the merits.

Dated: New York, New York
October 6, 1993

Respectfully submitted,

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BRIEF

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The New York State Association of Tobacco and Candy Distributors, Inc. ("Association" or "*Amicus*") submits this brief as *Amicus Curiae* in support of the petition for a writ of certiorari of the Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York.

INTEREST OF *AMICUS CURIAE*

Amicus is a New York not-for-profit corporation representing approximately 70 distributors of cigarettes in New York State. A list of the Association's members is set forth in the Appendix to this brief.[1] Its members sell to chain stores, other wholesalers, and retailers and distribute approximately 80% of all cigarettes sold in New York State.

The members of the Association generally sell only cigarettes, candy and related products. The Association's members purchase cigarettes directly from cigarette manufacturers and affix the required New York State and City excise tax stamps, purchasing the tax stamps at face value and recovering their cost when the cigarettes are sold, and are licensed tax agents of the State and City of New York for the collection of taxes on the sale of cigarettes within the State.

These cases represent an attempt to enjoin the enforcement of regulations, adopted by the Commissioner of Taxation and Finance in August, 1988, that were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations in New York State. In essence, the regulations permit retail dealers of cigarettes on qualified Indian reservations to purchase sufficient quantities of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time attempt to ensure that if they wish to make sales of cigarettes to non-Indians, they have a sufficient supply of taxed and stamped packages of cigarettes for that purpose. The regulations limit the sale of unstamped cigarettes to retailers at reservation outlets that have registered with the Department of Taxation and Finance. In addition, they limit the quantities of unstamped cigarettes that a reservation retailer may purchase or sell to an

[1] Two of the Association's members, Day Wholesale, Inc. and Milhelm Attea & Bros., Inc., the respondent in one of the cases, do not join in the motion and brief *Amicus Curiae* of the Association.

amount which is no greater than the maximum legitimate Indian consumption of the reservation on which the retailer is located. 20 N.Y. Comp. Codes R. & Regs. §§ 336.6 (f) and (g) and 336.7 (b), (c) and (d) (1992).

The Association has a direct and vital interest in the continued viability and enforcement of these regulations and, therefore, in the outcome of these cases. Many of the Association's members compete directly with licensed cigarette agents and other wholesalers that do not collect cigarette taxes on cigarettes sold to retail outlets on Indian reservations in New York State for resale to non-Indian purchasers. The tax on cigarettes in New York State is currently 56 cents on every package of 20 cigarettes sold. N.Y. Tax Law § 471(1) (McKinney Supp. 1993), *as amended by* 1993 N.Y. Laws ch. 57, § 53 (McKinney) (effective June 1, 1993). Agents and other wholesalers that do not purchase and affix the required tax stamps on packages of cigarettes sold to retailers at reservation outlets for resale to non-Indians evade the collection of $5.60 in cigarette taxes on every carton of cigarettes sold to Indian retailers for resale to non-Indian purchasers in New York State and thereby enjoy an unlawful competitive advantage over competing Association members and other legitimate agents that pay and collect the required tax on all of their cigarette sales within the State.

Indian retailers, in turn, aggressively market their exemption from State taxation to non-Indians who do not enjoy such an exemption, thereby achieving an unfair and inequitable price advantage over non-reservation businesses. As a result of an increase in State taxes on cigarettes of nearly 167% over the past five years, cigarette taxes have become an increasingly large percentage of the average wholesale price of a carton of cigarettes sold in New York, resulting in an increasingly unfair competitive burden on legitimate agents and other wholesalers. At the current average wholesale price of approximately $16.00 a carton, the cigarette tax imposed represents 35% of the average wholesale price of cigarettes sold within the State.

At the same time, violations of the State's regulations with respect to the possession, transportation and sale of cigarettes by reservation retailers within the State and by their off-reservation suppliers, have grown at an ever-increasing rate. Consequently, the State's ability to monitor the movement and distribution of cigarettes throughout the State has been severely hampered and the corresponding opportunity for evasion by reservation retailers and their suppliers of the sales and cigarette taxes imposed on non-Indian consumers within the State has become increasingly difficult to detect and prevent. The evasion of State taxes on reservation sales of cigarettes to non-Indian purchasers upon whom the State has the indisputable right to impose taxes assumes two distinct forms. The first involves supplying untaxed cigarettes to reservation outlets for direct sale to purchasers who either consume or resell the product within the State without paying the applicable taxes. The second entails using locations on Indian reservations as delivery and storage points for large volumes of untaxed Canadian and American brands of cigarettes, a portion of which is believed to be ultimately smuggled back into Canada, with the remaining portion being diverted to distribution and consumption in New York State.

Based upon a study undertaken in early 1993 by the Office of Tax Policy and Analysis of the Department of Taxation and Finance, the State estimates that the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets has resulted in the loss to the State of an estimated $50 million in excise tax on cigarettes and $15 million in sales and use taxes annually. These figures include only a portion of the losses attributable to bootlegging and unlawful exports of cigarettes from Canada through Indian reservations into New York. They also do not take into account sales by out-of-state suppliers not licensed by the Department, nor do they reflect the recent increase in the tax on cigarettes in New York State from $3.90 to $5.60 a carton. The Association believes that the actual loss in taxes annually to the State because of reservation sales of cigarettes to non-Indians is substantially higher. The industry estimate for lost State and local taxes on cigarettes sold on Indian

reservations is more than twice this amount. *See* Testimony of Robert W. Reid, Executive Director, Independent Petroleum Marketers of New York, at the Joint Legislative Hearing before the New York State Senate Standing Committee on Corporations, Authorities and Commissions and the New York State Assembly Subcommittee on Corporate Law, at 2 (May 27, 1992) (estimating lost State and local taxes on gasoline, diesel fuel and cigarettes sold on Indian reservations of in excess of $200 million).

According to the State's figures for the fiscal year ended March 31, 1993, the State collected approximately $543.9 million in excise tax on cigarettes alone. Thus, the $50 million in uncollected cigarette excise tax on the sale of unstamped cigarettes by reservation retailers represents approximately 8% of the taxable market.

In calendar year 1991, cigarette tax agents reported 10.6 million cartons of cigarettes sold on Indian reservations. During the fiscal year ended March 31, 1993, the Department of Taxation and Finance estimates that this figure increased to approximately 12.8 million cartons of cigarettes sold by licensed agents and wholesalers on Indian reservations – almost *100 times* the amount estimated to have been consumed (on average) by every enrolled Indian man, woman and child during that period. If all 12.8 million cartons estimated to have been sold on reservations during this period were consumed by enrolled Indians on reservations, every man, woman and child would have had to have consumed on average 12,800 packs of cigarettes (approximately *35 packs per day*) – as compared to the New York average of 130 packs of cigarettes a year – an amount almost 100 times the New York average. These figures represent estimates of only those cigarettes that *licensed* agents and wholesalers sold on Indian reservations over the past year. The actual amounts of unstamped cigarettes entering Indian reservations are undoubtedly far greater because unlicensed wholesalers do not file monthly reports or returns with the Department and the estimated figures do not fully take into account illegal bootlegging.

The unfair and inequitable competitive disadvantage to the Association's members that compete directly with licensed agents and other wholesalers who do not collect cigarette taxes on cigarettes sold to retail outlets and Indian reservations for resale to non-Indian purchasers has forced numerous legitimate agents and wholesalers to merge with other companies or go out of business altogether, with a resulting loss of business and jobs throughout large areas of the State. Based upon the State's conservative estimate of a $65 million loss to the State in cigarette, sales and use taxes annually – a loss that the Association believes to be significantly greater – the annual loss in revenue to Association members and other legitimate agents from the sale of untaxed cigarettes to non-Indians by retailers on Indian reservations is in excess of $205 million. Unless these regulations are upheld and enforced, legitimate wholesalers will continue to face unfair competition by agents and other wholesalers who evade their tax obligations.

While *Amicus* seeks the same result in these cases as does the State, it believes that its knowledge of the functioning and economics of the cigarette distribution industry in New York would be of particular assistance to the Court in facilitating an understanding of the industry and the purpose and effect of the regulations at issue.

ARGUMENT

Summary

The petition for a writ of certiorari should be granted because the decision of the New York Court of Appeals is in direct conflict with the decisions of this Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and this Court's order in this case (112 S. Ct. 926), granting petitioners' initial petition for a writ of certiorari, vacating the Appellate Division's prior order and remanding the case to the Appellate

Division for further consideration in light of *Potawatomi*. *Amicus* respectfully submits that, consistent with the prior decisions of this Court, the State of New York, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes, may require tax agents and other wholesalers that sell cigarettes to retail outlets on Indian reservations to comply with regulations which limit the quantity of untaxed cigarettes that can be purchased for resale by reservation retailers to an amount no greater than the maximum legitimate Indian consumption of the reservation on which the retailer is located and which impose upon the non-Indian suppliers only minimal burdens relating to recordkeeping and reporting.

THE REGULATIONS AT ISSUE AS APPLIED TO INDIAN TRADERS ARE VALID AND SHOULD BE UPHELD

This Court has been asked to determine whether New York State may enforce a regulatory scheme designed to aid in the collection of validly imposed State taxes on the sale of cigarettes on Indian reservations to non-Indian purchasers. The Court has made plain in its decisions in *Moe*, *Colville* and *Potawatomi* that States may impose minimal burdens on Indian trade to prevent the avoidance of tax by non-Indian purchasers of goods from retail outlets on Indian reservations. However, the court below decided that the regulations at issue could not be validly applied to the respondents' businesses, relying on its own decision in *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536, 516 N.Y.S.2d 179 (1987), *vacated and remanded*, 487 U.S. 1112, *aff'd on remand*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988), where the court held that the presumptive effect of the Indian trader statutes, 25 U.S.C. § 261 *et seq.* (1988), precluded the State from imposing *any* burden on Indian traders, however minimal.

Amicus believes that these cases were wrongly decided, that the decision below directly contravenes the prior decisions of this Court and that the issues presented raise important questions of federal law to those States in which Indian reservations are located. The consequence of the decision below will be that

legitimate wholesalers will continue to face unfair competition by other wholesalers who evade their tax obligation and be subjected to significant losses in revenue from the sale of untaxed cigarettes to non-Indians on Indian reservations in New York State.

A. Under Federal Law, States May Require Wholesalers Who Sell to Reservation Outlets to Comply with State Tax Regulations Whose Purpose Is to Prevent the Avoidance of Tax by Non-Indian Purchasers of Goods

The Court of Appeals held that the regulations at issue were invalid *per se* simply because Indian traders were regulated, no matter how minimal the burden imposed. However, as this Court plainly decided in *Moe*, *Colville* and *Potawatomi*, States may enforce regulations aimed at the collection of valid taxes on sales by Indians on Indian reservations which impose minimal burdens on Indian businesses, in order to prevent the avoidance of taxes by non-Indian purchasers of goods. If this holding is permitted to stand, New York will be left with no effective means to enforce the collection of its valid taxes on sales to non-Indians on Indian reservations and legitimate agents and wholesalers will be unable to compete with other wholesalers who evade their tax obligations.

In *Moe*, this Court explicitly ruled that states may regulate Indian retailers in order to ensure their compliance with valid state taxes. In that case, the Court found that Montana could require tribal sellers of cigarettes to collect a valid state sales tax imposed upon non-Indian purchasers of cigarettes, finding that a scheme whose purpose was identical to that of New York – the collection of valid state taxes – imposed a constitutionally permissible minimal burden on Indian businesses.

State regulations that require Indian retailers and their suppliers to assist in the collection of valid state taxes do not violate the letter of the Indian trader statutes so long as the regulations are not unreasonably burdensome, and do not violate the

purpose of those statutes which were enacted to protect Indians from unfair advantage. *See, e.g., Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

As this Court found in *Moe*:

> [T]he competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked. (emphasis omitted)

425 U.S. at 482. In New York, the loss of tax revenue from sales to non-Indians on Indian reservations is the "largest single form of evasion . . . ." *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2 (quoting Commissioner James W. Wetzler).

In *Colville*, this Court cited Moe for the principle that "if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." 447 U.S. at 159. Significantly, the Court referred to Indian "businesses" and did not draw arbitrary distinctions based upon a business's place in the chain of distribution, as did the court below.

At issue in *Colville* was a Washington State tax on the sale of cigarettes within the State. As with the New York regulations at issue here, reservation Indians could purchase unstamped cigarettes sold by tribal members, but non-Indians were required to pay the tax. The *Colville* Court reaffirmed *Moe* in holding that a state could impose minimal burdens upon tribal smoke shop operators in order to eliminate the evasion of taxes by non-Indian cigarette purchasers at those shops, despite the fact that

the smoke shop operators were federally licensed Indian traders who came fully within the scope of the Indian trader laws.[2] *See Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978).

The decision of the court below directly conflicts with *Colville*, where this Court extended the holding in *Moe* by holding that a state may enforce its regulations by seizing shipments of unstamped cigarettes sent to the reservation from wholesalers outside the state even though their sales to the Indian retailers were exempt from State taxation and no State tax was due while the cigarettes were in transit. 447 U.S. at 161-62. Although the goods at issue in *Colville* were seized from out-of-state wholesalers off the reservation, the wholesalers clearly were "Indian traders" within the Indian trading laws. Unquestionably, the burden imposed on those wholesalers was no less significant than that rejected by the New York Court of Appeals in this case. This Court in Colville unequivocally held that federal Indian law did not preempt the Washington regulations, stating:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

447 U.S. at 155.

In *Potawatomi*, this Court further solidified the principle that such regulations are permissible. In that case, the Potawatomi tribe sued to enjoin an assessment by the Oklahoma Tax Commission seeking back taxes for cigarette sales over a four-year period at a convenience store owned and operated by the tribe on land held in trust for it by the Federal Government. While

[2] This Court has interpreted the term "Indian trader" to apply to any person introducing goods or trading on an Indian reservation. *Central Machinery*, 448 U.S. at 164-65.

the Court found that the tribe's sovereign immunity prevented the collection of back taxes from a reservation retailer, as it did in *Moe* and *Colville*, it nonetheless concluded that sovereign immunity did not shield the tribe from prospective tax collection burdens. The Court held: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." 498 U.S. at 512. Significantly, this Court explicitly included Indian wholesalers among those to whom the State could look to collect taxes due:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or *by assessing wholesalers who supplied unstamped cigarettes to the tribal stores*. (emphasis added, citations omitted)

498 U.S. at 514.

However, in the decision below, the New York Court of Appeals erroneously concluded that this Court's statement in *Potawatomi* meant that the "remedies" referred to may be employed only *retroactively* to collect unpaid taxes on past sales, and that the State could not require Indian traders to assist in tax collection prospectively. 81 N.Y.2d at 426; 599 N.Y.S.2d at 514. In light of the principal holding of the Court of Appeals, there is no meaningful basis for the distinction made in the decision below. If, as the Court of Appeals concluded, the Indian

trader laws preclude the states from any regulation of trade with Indian traders whatsoever, any form of regulation would be prohibited, regardless of its retroactive or prospective nature.

Thus, it is clear that the holding of the court below in these cases that the Indian trader laws, by their very existence, place every transaction between an Indian retailer and its supplier beyond the regulatory authority of the states, is in direct conflict with federal law as interpreted by this Court. The consequence of the holding is that the State cannot effectively collect its valid taxes, and competitors of reservation suppliers are left with no remedy for the loss of business due to the unlawful sale of untaxed cigarettes to reservation outlets for resale to non-Indian consumers.

B. The Regulations at Issue Providing for the Collection of Taxes on Sales of Cigarettes to Non-Indians Impose Minimal Burdens on Non-Indian Suppliers Permissible Under Federal Law

The principal holding in the court below that, to the extent that this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens on Indian retailers and traders," the regulations at issue are barred by federal preemption because, in the court's view, they impose "significant" burdens on wholesalers (81 N.Y.2d 417, 427, 599 N.Y.S.2d 510, 514), is also plainly erroneous. This Court has never held that state laws which merely impose recordkeeping and reporting requirements on wholesalers selling goods to retail outlets on Indian reservations in order to assist a state in collecting valid taxes place an unacceptable burden on Indian commerce. To the contrary, in *Moe*, *Colville* and *Potawatomi*, this Court upheld the principle that regulations no less "burdensome" than the regulations at issue here may be enforced to assist in the collection of validly imposed taxes.

In its decision below, the New York Court of Appeals relied on its prior ruling in *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536, 544, 516 N.Y.S.2d 179, 184 (1987), *(Herzog I)*, where the court correctly expressed the standard to be applied in evaluating such state regulations:

> [W]hen a State tax is imposed upon, or otherwise burdens, a transaction between a non-Indian customer and an Indian individual or tribe, and the legal incidence of the tax is determined to properly fall on the non-Indian party, the Supreme Court has nonetheless "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" to determine whether the method of collecting the State tax is constitutional (Cohen, Federal Indian Law, at 413, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45).

This Court in *White Mountain*, however, went on to state that the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." 448 U.S. at 145. The New York Court of Appeals has erroneously applied a rigidly mechanical approach to the concept of tribal sovereignty in holding, without significant discussion, that the burden placed upon the wholesaler under the regulations at issue is excessive.

In the cases cited by the Court of Appeals where courts have struck down impermissible burdens on Indian trade, there has always been a direct state imposition on Indian commerce in the form of taxes, licenses, or other similar requirements aimed at or directly affecting Indians themselves. For example, in *White Mountain*, Arizona sought to enforce its motor carrier license tax and use fuel tax on a logging company that operated solely on an Indian reservation. The Supreme Court held that the taxes could not be enforced on "operations that are conducted solely on Bureau [of Indian Affairs] and tribal roads within the reservation." 448 U.S. at 148. The taxes would have taken value away from the reservation since the costs would be passed on to the Indian tribe, which was the beneficiary of the logging contracts. This Court found that the taxes would frustrate the general

federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.' *Id.* at 149 (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

In the cases primarily relied upon in the decision below, *Herzog I* and *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988) *(Herzog II)*, the Court of Appeals struck down New York regulations aimed at the collection of valid state taxes on motor fuel. In those cases, however, Indians actually *paid taxes* and were required to assume the burden of applying for refunds or credits. Thus, the regulatory scheme at issue in the *Herzog* cases arguably violated federal policy by taking value from Indians either for the short term, until the tax was credited, or permanently from those Indians who were unwilling or unable to apply for refunds or credits. In contrast, however, the plan at issue here *never* imposes a tax upon Indian sales to Indian purchasers. For the Court of Appeals to apply the same mechanical approach in rejecting both a plan that taxes sales to Indian consumers and a plan that does not, simply because both plans, to whatever degree, *affect* Indians, plainly goes against the intent of the prior decisions of this Court, impairs the State's ability to collect legitimate taxes, and deprives members of the Association of substantial revenues in the face of unlawful competition.

Finally, this Court should grant the petition for certiorari for two further reasons. First, in the decision below, the Court of Appeals misinterpreted the clear intent of this Court in remanding this case. Twice now, in the instant case and in *Herzog I*, this Court has vacated judgments and remanded decisions for reconsideration in light of regulations that allow the State to collect its valid taxes while not taxing sales by Indians to Indian purchasers. Despite these remands, the Court of Appeals has not altered its view that any burden, however minimal and for whatever valid purpose, is improper. The Court of Appeals clearly has misread the intent of this Court in remanding these cases, and the petition for a writ of certiorari should be granted in order to rectify the error.

Second, the petition should be granted in order to establish the Court's position on this important issue beyond possible dispute. Respondents urged in the court below that this Court's observations in *Potawatomi* that states could ensure the collection of cigarette taxes "by assessing wholesalers who supplied unstamped cigarettes to the tribal stores," 498 U.S. at 514, is mere *obiter dictum* and therefore has no precedential value. Even if this Court's observation in *Potawatomi* is *dictum*, it is well-settled that *dicta* of this Court must be accorded significant weight by lower courts. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 496 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *In re Comac Co.*, 402 F. Supp. 43, 45 (E.D. Mich. 1975). However, it is imperative that this vital issue be resolved in an unambiguous holding, in order to enable states to stem the increasing loss of revenues through misinterpretation of federal law, and to enable legitimate suppliers of reservation retailers to compete on a lawful and equal basis.

Congress never intended for Indians or their off-reservation suppliers to benefit from the windfalls that arise from the protections afforded by the Indian Trader laws. If those statutes are construed to confer inequitable competitive advantages upon the Indian traders to the detriment of competing distributors, including members of the Association, and to facilitate the avoidance of legitimately imposed tax obligations, member distributors located in close proximity to reservations will continue to suffer substantial economic losses and the State will continue to be deprived of much-needed tax revenues.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Dated: New York, New York
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Respectfully submitted,

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APPENDIX

APPENDIX

MEMBER LIST

NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC.

Amsterdam Tobacco Co.
Amy-Lynne Corp. d/b/a Bellerose Tobacco
Andy's Tobacco & Candy Wholesale
Auer & Co., Inc.

Bonanza Trading Associates
Boro Park Tobacco Company
Borough Hall-Oxford Tobacco Corp.
Brighton Tobacco & Candy Co.
Bronx Beer
Buffalo Tobacco Products

C.G. Marousis Company, Inc.
Center Candy Corp.
City Line Candy

Day Wholesale, Inc.
Derigo Sales, Inc.
Donohue and Higgins Candy & Tobacco Company
Duane Reade Corp.

E.P. Kirst & Sons, Inc.
Elmira Tobacco Company, Inc.
Empire Candy & Tobacco Co.

F & T Distributing Co, Inc.
Finkle Distributors, Inc.
Frank Colucci Inc.

Globe Wholesale Co.
Gray's Wholesale, Inc.
Gutlove and Shirvint, Inc.

H.P. Brewster Company d/b/a Button Bros., Inc.
Harold Levinson Associates
Harry J. Fourtunis, Inc.
Herkimer Wholesale Co., Inc.

I. Rothschild, Inc.
Irving Ness Co.

J.A. Calderon & Company, Inc.
J.J. Maloney Company, Inc.
Jack Gordon Tobacco Co., Inc.
Jacob Kern & Sons, Inc.
Jones-McIntosh Tobacco Co.
Joslen Wholesale Co., Inc.

Keystone Candy & Tobacco Co.
Kingston Candy & Tobacco Co.
The Kroger Company, Inc.

Lavin Candy Co., Inc.

Mandel Tobacco Company, Inc.
Mauro Pennisi Inc.
Milhelm Attea & Bros., Inc.
Miller Automatic, Inc.
Morris Brown, Inc.
Mountain Candy & Cigar Co., Inc.
d/b/a Mountain/Service Distributors
Mutual Candy Company
Mutual Wholesale Services Inc.

NCC
Newcastle Tobacco & Candy, Inc.
North Country Candy and Tobacco Inc.

Queens Tobacco and Candy Company, Inc.

Richmond Wholesale Co., Inc.
The Rowe Corporation

S & L East
Sanders Langsam Tobacco Co., Inc.
Scheidelman, Inc.
Sheal Inc.
Sho-Sho Bros., Inc.
South Beach Novelties & Confectionery Co., Inc.
Stan-Lou Tobacco Inc.
Standard-Rosenbaum, Inc.
Sunrise Candy & Tobacco Co.

T & R Tobacco Sales Company
Tzetzo Bros., Inc.

United Candy & Tobacco Co., Inc.

W.E. Brown & Company, Inc.
Westchester Candy Supply